

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE CARLA BALDWIN CARRY, MAGISTRATE JUDGE
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4 TESLA, INC., a Delaware :
corporation, :
5 :
Plaintiff, : No. 3:18-cv-296-LRH-CBC
6 :
-vs- : October 1, 2018
7 :
MARTIN TRIPP, an individual, : Reno, Nevada
8 :
Defendant. :
9 _____ :

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11 TRANSCRIPT OF CASE MANAGEMENT CONFERENCE
12

13 APPEARANCES:

14 FOR THE PLAINTIFF: ALLISON LAREN LIBEU and
STEPHEN RICHARDS
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16 Los Angeles, California
17

18 FOR THE DEFENDANT: WILLIAM M. FISCHBACH, III
Attorney at Law
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20

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1 RENO, NEVADA, MONDAY, OCTOBER 1, 2018, 9:00 A.M.

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4 THE CLERK: This is the date set for a case
5 management conference in case number 18-CV-0296-LRH-CBC,
6 Tesla, Incorporated, versus Martin Tripp.

7 Present on behalf of plaintiff, Allison Libeu
8 and Stephen Richards. Present on behalf of defendant, William
9 Fischbach.

10 THE COURT: Good morning, everyone. Thank you
11 so much for being here today.

12 We have several things, I think, to go over with
13 the case management report so I'm just going to go through
14 first what I've reviewed so that you're aware of my knowledge
15 level of the case, and then we'll just work through the case
16 management report.

17 At the end, which I think is really where more
18 of the issues are, we'll get to the protective order issues
19 specifically, and we'll go through those, and hopefully we can
20 get all that resolved today so that you guys can move forward
21 with your discovery.

22 For purposes of this hearing, I have reviewed
23 the complaint as well as the -- which is docket number 1, the
24 stipulation and order on the extension of time for the
25 original scheduling order, which was docket number 14, the

1 answer and counterclaims at docket 25 and all of those
2 attachments that were there as well, the scheduling order at
3 docket 31, and then, of course, the case management report and
4 the specific attachments to that.

5 So I'm very familiar with the case and familiar
6 with the issues that are going on.

7 Let me start with this. According to paragraph
8 9(a) of the case management report, let's see, at paragraph
9 31 -- or docket 31, at paragraph 1 which was filed on
10 August 29th of 2018, there was a reference in there -- let me
11 pull it up so that I know what I'm talking about here -- that
12 the initial disclosures were due on August 29th of 2018.

13 And just so I'm clear for the record, my
14 assumption is that that is not -- those have not been provided
15 because of the issues with the protective order, or have those
16 been provided already?

17 MS. LIBEU: Those have been provided by both
18 sides. We have exchanged those.

19 THE COURT: Okay. And for purposes of this
20 hearing, feel free, please, to just stay seated and move the
21 microphones close to you, so that way we can pick up all the
22 information, no need to stand up. I appreciate that, but no
23 need to do that.

24 MS. LIBEU: Thank you, your Honor.

25 THE COURT: So there have been initial

1 disclosures made, but there just hasn't been additional
2 document discovery at this point beyond the initial
3 disclosures; is that accurate?

4 MR. FISCHBACH: Actually, your Honor, Mr. Tripp
5 has disclosed quite a bit of information in forms -- in the
6 form of documentary evidence some of which I believe Tesla has
7 already designated as confidential.

8 THE COURT: Okay.

9 MS. LIBEU: Yes, your Honor. What we did in the
10 interim is counsel agreed between us to treat things
11 designated confidential as confidential until a protective
12 order is entered at which time it will govern. So the entry
13 of the protective order hasn't held up discovery in the case.

14 THE COURT: Okay.

15 MS. LIBEU: Both sides have exchanged document
16 requests and interrogatories. I believe we got Mr. Tripp's
17 first set last week.

18 THE COURT: Okay. Perfect.

19 So that was going to be my question was at what
20 point was there an issue with the protective order. I just
21 wanted to make sure that it wasn't slowing up discovery at
22 this point.

23 Have both parties dis -- or exchanged
24 interrogatories and other requests for production at this
25 point, or is that just on the one side?

1 MR. FISCHBACH: We have, your Honor.

2 THE COURT: Okay.

3 MS. LIBEU: Both sides have done so, yes.

4 THE COURT: Great. Have you at this point
5 started considering the scheduling of depositions or how many
6 you intend to have?

7 MS. LIBEU: We haven't had discussions about
8 depositions yet, your Honor.

9 THE COURT: Okay.

10 MR. FISCHBACH: And, Judge, part of that is
11 driven by -- as you probably know, our deadline to amend
12 pleadings is approaching.

13 We're considering whether or not we should amend
14 to include Mr. Musk as an individual defendant, or other
15 officers of Tesla. That may affect what depositions are or
16 are not taken.

17 THE COURT: Okay. And I guess that brings me to
18 my -- my general concern is that with discovery starting to
19 tick already with July 31st as an answering date, I think the
20 scheduling order that we have now, and likely the discovery
21 cutoff, I'm assuming that -- I would assume that everybody is
22 already looking at those dates and thinking that those might
23 be too soon?

24 I'm not sure, but, you know, that certainly if
25 there's going to be amended pleadings to add different

1 defendants and things like that -- we'll get to that when that
2 happens, but I certainly was looking at that thinking
3 especially -- although I have -- I will say this, I'm very
4 pleased to hear that so much has happened. I was under the
5 impression that maybe nothing had happened because of the
6 protective order so I'm very pleased to hear that you guys
7 have continued to do that.

8 Let's see. The one area of concern that I do
9 have relates to the electronic discovery, and a part of that
10 is this: I appreciate that everyone has agreed to the use of
11 concordance and two formats and metaformats and all of the
12 metadata, but what I am a bit concerned about is that we have
13 no limitations on dates in terms of the scope of where -- you
14 know, what dates these were going to be because, obviously,
15 without any kind of parameters around what's supposed to be
16 gathered without dates or times or things like that, it makes
17 me a little bit concerned that it's going to be very onerous
18 and very expensive.

19 I will leave that to the parties, but it's just
20 something that immediately kind of struck me.

21 The other concern I had is there's no limitation
22 on search terms or anything of that nature to sort of make
23 sure that the parties are staying within the realm of what's
24 in the complaint, in the answer, in the counterclaim.

25 So I would simply at this point let you all know

1 that if there's issues with discovery over the ESI, and
2 there's complaints about those things, since there hasn't been
3 those limitations, I may impose those if we get to that point,
4 but it immediately struck me that those weren't -- weren't
5 somehow delineated.

6 And I'll be honest with you, I'm quite pleased
7 with how detailed you are with respect to what you have in
8 here, but those limitations I think could become problematic
9 without having them already in there on a going-forward basis.

10 That's just a thought from my perspective, so if
11 we do end up with discovery disputes over that, we'll have to
12 revisit whether or not parameters need to be placed in there
13 on those.

14 I want to make sure that both parties have
15 access. There isn't any issue with the use of concordance or
16 anything like that. Is that true?

17 MS. LIBEU: Yes.

18 THE COURT: Okay.

19 MS. LIBEU: Both sides agreed to that format.

20 MR. FISCHBACH: That was agreed to, Judge.

21 THE COURT: Okay. Well, my only concern is that
22 I have people say that, and then they come back and say, "I
23 can't access the database, I can't get in." So I want to make
24 sure that everybody is able to do that so we don't have any
25 problems with that.

1 MR. FISCHBACH: Judge, I'll give my adversaries
2 an A plus plus in terms of their professionalism, and so we've
3 been working very well on these issues.

4 THE COURT: All right. Perfect.

5 MS. LIBEU: I would, by the way, echo that, your
6 Honor. Counsel has, I think, been very professional on the
7 other side as well, so we've been able to work many of these
8 issues out.

9 THE COURT: Well, I can tell you from what I've
10 seen, it appears that you are working very well together on
11 what could be a very complex and even difficult piece of
12 litigation, so I do appreciate that.

13 Let's see. The next issue I have concerns about
14 had to do with privileged communications.

15 I didn't see any glaring issues, but there
16 doesn't seem to be -- I guess my concern would be whether or
17 not there would have been any privilege issues as it related
18 to the breach in terms of the statements that were made, you
19 know, whether any internal communications going on as to what
20 could be released and what couldn't, and I could see there
21 being some privilege issues over that if there's in-house
22 counsel making, you know, advise or outside counsel that had
23 been brought on based on what had happened.

24 Again, this is just my observations for people
25 to be aware of what I see as potential issues so that we can

1 sort of make sure that we're prepared for those before they
2 happen.

3 I don't know if that will be a major issue in
4 this case, but it was something that sort of stuck out to me
5 as I read through your joint discovery statement, so I just
6 wanted to raise that with everybody.

7 Those can be very complex issues for us to work
8 through when there are privilege issues so just -- that was my
9 immediate thing.

10 I think that really brings us to the heart of
11 what we need to discuss today, and that's the protective order
12 and the parameters on the protective order.

13 I've read the case that's been provided by
14 Tesla, the *Brown Bag* case from the Ninth Circuit, and the one
15 thing I will say is that I was -- that case doesn't seem to be
16 directly on point because it was dealing with the issue of, as
17 I recall, in-house counsel who isn't necessarily a party to
18 the litigation.

19 So here we have a party that we're trying to
20 exclude from being able to review and look at discovery, and
21 so I think that that actually changes the analysis to some
22 degree.

23 I have done pretty extensive independent
24 research trying to come up with what would be the appropriate
25 parameters and scope of this.

1 I will say that under the Federal Rules of Civil
2 Procedure 26(c), (f), (g), there is obviously a mechanism for
3 that. In fact, the rule actually contemplates that where
4 trade secrets are going to be at issue, there can be a way for
5 those to be limited in how they're revealed and the way that
6 they're designated, so it's not totally outside of the scope
7 to have that.

8 But I do have concerns about limiting the
9 ability of a party to have access to discovery because I do
10 think it becomes an issue of whether that person is able to
11 really assist their counsel if they can't see it.

12 So I have a variety of questions for both sides
13 that I'd like to kind of go through to see if I can get a
14 better handle on how we can move forward with this.

15 I will say that I have found at least one case
16 where a party has been limited so it's not unheard of.

17 So let me start with Tesla's counsel. I guess
18 the first thing that seems sort of obvious to me is, aren't
19 these already issues that the defendant would have already
20 had?

21 You know, whatever is going to be disclosed in
22 discovery, aren't you already alleging that he's already had
23 access to them and, in fact, has disclosed them to third
24 parties, so what exactly would you be needing to protect that
25 he hasn't already seen?

1 MS. LIBEU: Certainly, your Honor.

2 With the information that he's already seen,
3 we've designated that already confidential.

4 What we're talking -- and counsel on the other
5 side has no issue with having a confidentiality designation in
6 the protective order.

7 THE COURT: Correct.

8 MS. LIBEU: So we don't anticipate and haven't
9 designated those materials attorneys' eyes only.

10 What we're talking about is additional materials
11 that we would be producing in the case, and some of those
12 materials may relate to things that are very commercially
13 sensitive and proprietary to Tesla, including the
14 manufacturing process for battery 3s, issues in that process,
15 how it's done, the amount of scrap generated.

16 Those are things where we will be showing that
17 the information Mr. Tripp has is, in fact, not correct, and
18 this is new information that we will be handing over to his
19 attorneys that we would not like Mr. Tripp to have, and, in
20 particular, because we are very concerned, not only did he
21 disclose information before this lawsuit was filed, but during
22 the lawsuit while he was represented by counsel, Tweeted
23 screenshots of information that he took from Tesla, including
24 VIN numbers of cars and screenshots of internal documents.

25 And counsel, to their credit, encouraged

1 Mr. Tripp to delete those Tweets after the fact, but they
2 couldn't get in touch with him for half a day or such, so the
3 information remained online causing harm to Tesla.

4 And we're concerned about something like that
5 happening again, especially because Mr. Tripp, we understand,
6 is abroad, may not be -- may flout the Court's orders knowing
7 that he is abroad.

8 And if I may say one thing about *Brown Bag*, your
9 Honor, I understand your point about it being a little
10 different than this case, but it was in-house counsel.

11 Because it was a company in that case, in-house
12 counsel essentially is the client, because it's a party,
13 because in-house counsel is the representative of the party, I
14 would respectfully submit that it is the same thing because
15 you're denying the parties' representative, because the party
16 is an entity, of having that information in that case, and
17 although it's an individual here, the same thing applies.

18 What the Ninth Circuit said was we strike a
19 reasonable balance in cases where disclosure of trade secrets
20 that are at issue, and the reasonable balance the Ninth
21 Circuit struck and said was appropriate was outside counsel
22 and experts could see the materials, but the party itself who
23 was represented by the in-house counsel could not.

24 And that's exactly what we're asking for here is
25 a reasonable balance where his legal counsel and expert team

1 can review the materials, and, again, this would only apply to
2 the limited set of attorney's eyes only materials.

3 Mr. Tripp can see confidentially designated
4 materials, just not the more limited AEO materials.

5 And if his concern is that we are going to over
6 designate AEO materials, obviously there's a mechanism in the
7 protective order -- if he doesn't believe that the materials
8 we designate as attorneys' eyes only merit that designation,
9 there's a mechanism for her -- for him to challenge that, and
10 then your Honor would be the ultimate arbiter of what is and
11 what is not appropriate in that designation.

12 THE COURT: Okay. Let me just direct
13 everybody -- when I was prepping for this, I was really using
14 the Exhibit C, so it may be best if we just kind of walk
15 through Exhibit C as we walk through my questions because one
16 of the points that you've just made actually brings me to
17 paragraph 6 -- or section 6, paragraph (b).

18 You indicate that he's already overseas, and it
19 seems to me that that particular paragraph actually addresses
20 the issue that this information can't be sent overseas. So if
21 he's overseas, isn't that already going to deal with that
22 issue?

23 MS. LIBEU: Exactly. I'm hopeful that's the
24 case. But counsel for Mr. Tripp has said they may, because
25 he's overseas, want to share things on a screen-sharing

1 software, which although itself doesn't allow download, he
2 could take screenshots or photos and the like, and, if he's
3 overseas, isn't supposed to be looking at this material
4 overseas.

5 I understand the issue with them is part of the
6 reason they want to be able to share materials with him in an
7 electronic format is that he is overseas, but I do agree with
8 you that this provision should prevent that from happening,
9 the sharing with it while he's overseas.

10 THE COURT: Okay. Well, let me just say right
11 now that I am not inclined to grant, even if we get to that
12 point, the ability of him to review things via Skype, FaceTime
13 or things like that.

14 And I'll tell you right now, because I actually
15 have had cases where somebody on the other side of that is not
16 supposed to be taking screen captures and is doing exactly
17 that. In one of the cases I had, it ended up in resulting in
18 a very high level extortion of the other party.

19 So I'm not inclined to do that because there's
20 no control for the counsel on one end to prevent him from
21 doing that on the other end.

22 But at the same time I'm not comfortable with
23 the idea that he be completely excluded from the materials,
24 and I know that that makes it harder for defense counsel
25 because he's overseas, but there has to be some sort of a way

1 that we're balancing both parties' interests but at the same
2 time protecting the material.

3 I think that takes me -- let's see. Under
4 section 7, paragraph (d), I think I have some concerns with
5 how this is phrased, and that's particular to line 14 where
6 you have a sentence in there,

7 "If no indication on the record is made, all
8 information disclosed during a deposition will
9 automatically be deemed 'CONFIDENTIAL - ATTORNEYS'
10 EYES ONLY' until such time as it may be appropriately
11 designated...."

12 That seems to be concerning to me, especially if
13 you are going to be limiting the ability of who can see those
14 materials. To have it automatically default to that most
15 sensitive disclosure seems to me to be a bit overinclusive and
16 concerning in that perspective.

17 Can you speak to that issue.

18 MS. LIBEU: This provision in particular is
19 agreed upon by counsel but with the caveat, of course, that
20 the attorneys' eyes only provision that Mr. Tripp's counsel
21 provided has a provision in which he can review the materials
22 under certain circumstances.

23 We'd be willing to change this from
24 "confidential - attorneys' eyes only" to just "confidential"
25 in this particular provision if that would allay the Court's

1 concerns about it.

2 THE COURT: Well, I mean, if -- can you speak to
3 that?

4 MR. FISCHBACH: And I think that makes good
5 sense, Judge. I don't know that we've kind of thought that
6 all the way through when both sides were agreeing to that. So
7 I think that's a good -- a good compromising resolution on
8 that issue, Judge.

9 THE COURT: Okay. Perfect.

10 Let me -- just going back, just as a
11 typographical issue -- first off, I want to thank everybody
12 for providing me a redline version because it makes it much
13 easier to see where the differences and the distinctions are
14 between the parties.

15 Just going back -- and, I'm sorry, I should have
16 brought this up at the very beginning. At the very front of
17 this there was a deletion of "a Delaware corporation," and an
18 inclusion of "an individual." I'm assuming that's a
19 typographical error?

20 MS. LIBEU: It's a typographical error, yes,
21 your Honor. I believe that was a typographical error on our
22 end, and we apologize for that.

23 THE COURT: Okay. I just wanted to make sure.
24 I think that's the subject of a different lawsuit.

25 Okay. Let me move over to -- section 8(b) is my

1 next concern. Let me see.

2 So in this provision the plaintiff is
3 unilaterally designating information as confidential that's
4 actually in the defendant's possession.

5 MS. LIBEU: Yes.

6 THE COURT: Before they've even seen what's in
7 the defendant's possession?

8 MS. LIBEU: Well, we've fixed -- addressed this,
9 your Honor.

10 THE COURT: Okay.

11 MS. LIBEU: Because we've now seen -- Mr. Tripp
12 has now produced what's in his possession.

13 THE COURT: Okay.

14 MS. LIBEU: So we've designated the materials
15 that he produced document by document which are confidential
16 Tesla information. So because he obviously took information
17 from Tesla, there's Tesla confidential information we would
18 like to designate confidential.

19 That is what this paragraph is meant to address,
20 but since then we have now designated it by Bates number.

21 THE COURT: Okay.

22 MS. LIBEU: So we've done that with counsel and,
23 in addition to stamping the documents, sent a letter
24 identifying by Bates number those documents.

25 THE COURT: Okay. Does defense have any issue

1 with that?

2 MR. FISCHBACH: I think given where we're at,
3 Judge, seeing as how they have now taken the additional step
4 of designating by Bates number everything that's confidential,
5 I mean, the paragraph is almost superfluous at this point.

6 THE COURT: Okay. I just wanted to make sure
7 because there was sort of an ongoing concern for me that, you
8 know, before defendant can even turn anything over, there's
9 some blanket confidentiality imposed on the defense.

10 And I think there's other provisions that
11 indicate that if it's the parties' own documents, they're not
12 prohibited from using those or what have you. So those two
13 things seem to be intention.

14 But if that's already kind of dealt with, then I
15 think -- I'm fine with that, but I just wanted to clarify it.

16 MS. LIBEU: If I may, your Honor, I think the
17 issue here is that we have the unusual situation where, of
18 course, if it's your own document, you can use it, but
19 Mr. Tripp is in possession of Tesla's documents.

20 THE COURT: Okay.

21 MS. LIBEU: So that's what this is meant to
22 posses.

23 Certainly his own information independent of
24 Tesla is not meant to cover. This is just meant to cover the
25 information that he has that he took from Tesla.

1 MR. FISCHBACH: And, Judge, I'd -- and I'd maybe
2 like to suggest we consider at this point deleting that
3 paragraph because I understand what Tesla is trying to do.
4 They didn't know what he had at that point.

5 THE COURT: Okay.

6 MS. LIBEU: Right.

7 MR. FISCHBACH: And they said until further
8 notice, that's all confidential.

9 THE COURT: Right.

10 MR. FISCHBACH: But you're correct, Judge, this
11 could be read so broadly is, if I hire an expert and say, hey,
12 here's his CV, well, it's confidential now, and I don't think
13 that's what the parties were intending.

14 MS. LIBEU: Certainly not.

15 THE COURT: Okay.

16 MR. FISCHBACH: So I'd suggest maybe -- and I'd
17 obviously welcome Ms. Libeu's input just deleting the
18 paragraph at this point in time because it's been overcome by
19 events.

20 MS. LIBEU: I think what I would suggest we do
21 is not delete the paragraph in its entirety but rephrase it so
22 it's clear that Tesla documents that we've designated by Bates
23 number, and we can maybe insert the Bates number here --

24 THE COURT: Or even --

25 MS. LIBEU: -- are confidential.

1 THE COURT: I guess one thing I would say is
2 just to -- it does say derived from plaintiff's
3 confidential -- but I think it may be better to say I'm hereby
4 designating as confidential that was plaintiff's property.

5 MS. LIBEU: We can do that.

6 THE COURT: Or something of that nature, or
7 derived from plaintiff's property, so that way it's clear that
8 it's only to those documents that would have been specifically
9 alleged to be the plaintiff's or somehow derivative of that as
10 opposed to just a broad, open-ended thing just to be -- so
11 that it's more clear.

12 I will tell you that the detail on this
13 protective order is the type of thing that ends up causing a
14 lot more litigation than the more simple protective order. So
15 that's one thing I'm trying to avoid is a lot of litigation
16 over the protective order itself in the future, although I
17 will say I'm very pleased with how well everybody is getting
18 along. I would have not expected that in this kind of
19 litigation.

20 So that brings me to paragraph 9 --

21 MR. FISCHBACH: I'm sorry, Judge, before we --
22 before we -- would you like the parties to meet and confer on
23 some proposed language and maybe just e-mail it to your
24 chambers or -- I think we can figure it out is kind of what
25 I'm saying.

1 THE COURT: With all of this?

2 MR. FISCHBACH: Well, no, with 8(b).

3 THE COURT: Yeah, that's fine. But what my
4 suggestion is, is just to work on some sort of language to
5 narrow that.

6 MS. LIBEU: Certainly.

7 THE COURT: If you want to work on it together
8 to come up with that, because always what my plan will be
9 after the end of this is that you both re-prepare something
10 for me based on what we talk about today. So however you want
11 to do that, I'm happy with that. But we can get through this
12 and then we can go from there.

13 MS. LIBEU: I'm confident that we can agree on
14 language along the lines that your Honor proposed.

15 THE COURT: Okay. Moving on to paragraph 9(a),
16 I have to say one thing that struck me here in this particular
17 paragraph at line 21 is where it states it contains or
18 reflects information that is, and I quote, "extremely
19 confidential."

20 Is there anything more than just confidential?
21 I mean, I guess that language seems very ambiguous to me and
22 should be more specifically designated as pursuant to the
23 rule, you know, something that reflects information that is
24 trade secrets or deemed trade secrets or something like that.

25 I think language like it's "extremely

1 confidential," I don't know, that's like saying I strenuously
2 object from the movie *A Few Good Men* -- I mean, it's an
3 objection, there isn't really anything more than that.

4 We already have confidential, so it should be
5 more specific to what that is. So that would be my suggestion
6 for that language unless the parties have any objection to
7 that.

8 MS. LIBEU: No, your point is well taken, your
9 Honor.

10 THE COURT: Okay.

11 MS. LIBEU: I think we can -- we can work on
12 language along those lines.

13 THE COURT: Okay. Anything from the defense on
14 that?

15 MR. FISCHBACH: I agree, Judge, I think we
16 can -- we can tighten it up.

17 THE COURT: Okay. I've already indicated that
18 I'm not comfortable with the idea that the defendant be able
19 to have access to these materials via some sort of online
20 medium or teleconferencing medium without having any ability
21 to control what he can do on the other end. I just -- I don't
22 think there's any way to do that.

23 And unless I hear something different, and I'll
24 let the defense, you know, respond to that, but those are my
25 concerns, and if you can address that, I think that would be

1 helpful, I think, at this point.

2 MR. FISCHBACH: And I'm happy to, Judge.

3 As you know, Mr. Tripp is living abroad now, and
4 he's living abroad because of fears for his safety.

5 As you know, one of the things we allege in our
6 counterclaim is that Tesla appeared to have information on his
7 exact location as these events were unfolding, and I don't
8 doubt that Tesla, being very well resourced, essentially has
9 the ability to continue doing that.

10 So he has -- he has fled the country out of
11 fears for his privacy and for the privacy of his family, and
12 so I -- I don't know that it's fair to punish him for moving
13 out of the country because of Tesla's conduct and, therefore,
14 he now can't participate in the defense of his own case.

15 I agree that if he was still here, we could
16 just, you know, summon him to our office and say all right,
17 let's go over this stuff here in our office.

18 But I think in this case where -- is -- the
19 circumstances of being overseas was prompted by Tesla's own
20 conduct, I'd ask the Court to reconsider that position.

21 THE COURT: Well, like I said, I still have --
22 and I understand the position, and I understand the concerns,
23 but I have grave concerns with the idea, and I think that
24 Tesla's point's well taken in that, you know, this whole case
25 emanates from the idea -- and it's allegations, so, you know,

1 it's something that will be proved at trial.

2 But the allegations at this point are that this
3 particular plaintiff had -- or defendant had access to
4 plaintiff's information and disclosed that, and so I think
5 there's legitimate concerns about their trade secrets and
6 things like that being further disclosed. I don't think
7 that's an unfair position for them to take.

8 I have, as I know I've already indicated,
9 concerns about the way that that could be done through
10 teleconferencing or through some sort of online mechanism
11 because I still don't hear anything that says that there's a
12 way to prevent him from, you know, essentially recording on
13 the other end.

14 But it seems like there's got to be some sort of
15 medium between all of this. I think that the protective order
16 itself already provides for mechanisms that prevent the
17 plaintiff -- or the defendant from disclosing this, and, in
18 this case, you now have a situation where, if he signs the
19 protective order, he agrees to the terms of the protective
20 order.

21 It is a little bit different than at the
22 beginning of the litigation where at that point he could be
23 held in contempt, there could be sanctions, and, quite
24 frankly, I mean, I wouldn't be surprised if there couldn't be
25 criminal proceedings as it relates to some of this breach

1 information.

2 So I do think that it is sufficient to be able
3 to designate it as attorneys' eyes only, but to the extent
4 that he needs to see it, I think that at some point he's going
5 to have to come back to the United States, correct me if I'm
6 wrong, and if there really are issues that you need to provide
7 to him, then that should be done in your office in the
8 presence of someone else, whether it be an expert or attorneys
9 or something like that, that prohibits him from making copies,
10 from having any, you know, cellphones or anything where he
11 could photograph or otherwise duplicate that.

12 But I think that that has to be the mechanism,
13 that he has to be physically here to see it so that he can't
14 somehow duplicate it. And I know that that makes that a
15 little bit onerous, but, at the same time, it doesn't entirely
16 prevent him from being able to assist you if it's needed.

17 If that becomes a serious problem for you, then
18 we just -- you know, call chambers, come back in, and we'll
19 see how we can work through some way to make that so that it
20 works for your client.

21 But my position is that -- and what my
22 expectation will be for this is that the defendant can have
23 access, but it is limited to his attorneys' offices in the
24 presence of a third person, and I think that that strikes the
25 balance that it may be difficult for both parties, but I think

1 it's the best that we can do under the circumstances.

2 But there should be a provision in there that if
3 there is an issue for the defense truly being able to prepare,
4 that they have a mechanism to come back to court for us to set
5 up some sort of an exception to that as needed.

6 MR. FISCHBACH: And, Judge, I think we can work
7 on that. A lot of it will depend just how liberally or
8 conservatively Tesla applies the attorneys' eyes only
9 designation.

10 THE COURT: And I agree, and I think that was
11 one of my concerns.

12 And what I read in the case conference report,
13 too, is that over designation, you know, making everything
14 attorneys' eyes only and that type of thing, is not going to
15 be looked at favorably by the Court, I can tell you right now.

16 Those make -- in any litigation, it makes it
17 much more onerous for everyone involved, and that should not
18 be liberally used. That's not to say that you shouldn't be
19 making sure that you're protecting your client's information,
20 but you also should not be making it difficult for everybody
21 to litigate the case when it's unnecessary. So I will say
22 that on the record.

23 MR. FISCHBACH: And, Judge, while we're -- this
24 has kind of caused me to have some concerns now about 6(b)
25 because I think we can -- assuming Tesla is reasonable with

1 the attorneys' eyes only designation, if it means Mr. Tripp
2 has to fly back here, then so be it.

3 But under 6(b), it basically precludes us from
4 sending him anything if it's deemed confidential, and I think
5 that's -- the concerns you're having there are -- the
6 exception is now kind of swallowing the rule here.

7 THE COURT: Well, maybe what that gets changed
8 to is the -- you know, the "confidential - attorneys' eyes
9 only" doesn't get sent overseas, or maybe there's a specific
10 provision in there that makes an exception for confidential
11 materials that may need to be sent to the defendant, may be
12 allowed, but beyond that it can't go to anybody else.

13 But if it's only designated as confidential,
14 he's going to have to sign the protective order, and I
15 understand the concerns that he might be outside the scope of
16 the jurisdiction of the Court theoretically, but he's also
17 party to this litigation. So that puts him in a bit of a
18 different position, I think, ultimately as that relates to his
19 requirements to comply with the Court's orders.

20 But I think that's a point well taken to make
21 sure that that isn't, as you said, swallowing -- you know, the
22 exception swallowing the rule in that particular provision.

23 MR. FISCHBACH: Thank you, Judge. We'll work on
24 that.

25 THE COURT: Okay. Thank you.

1 The next thing, really, I think goes to the
2 expert notices, and I'll be honest with you, I'm not going to
3 agree to that, and this is my main concern.

4 If Tesla's true concern is really that whoever
5 gets this, they need to know who it is, why would they be
6 agreeing to not require that for the unknown consultant who
7 isn't testifying?

8 So, from my perspective, I agree with the
9 defense that this really looks more like some sort of a
10 litigation tactic.

11 And I think it's unfair to both parties to
12 require people to designate specifically who is going to be a
13 testifying witness and who isn't before they even know who
14 they want to have as a testifying witness, for one, going to
15 the point of having people's CVs having to be turned over and
16 their titles and their employers, I just don't think that's
17 appropriate.

18 We already have the protections of the
19 protective order. They have to sign those. I think that
20 that's more than sufficient.

21 If it becomes a problem, as I've already
22 indicated, I'm more than happy, we can set a hearing and we'll
23 deal with it. But if you're going to allow unknown
24 consultants and those people to have access without having to
25 know any of that, it seems -- quite frankly, it doesn't make

1 any sense to me to require people that you actually are going
2 to know about to do it instead. That doesn't make a lot of
3 sense to me.

4 So I'm not going to impose those notice
5 requirements so those need to be deleted.

6 MS. LIBEU: If I may just briefly, your Honor, I
7 understand -- I understand your ruling. I just want to
8 clarify the exception for consultants was at the request of
9 opposing counsel. Our original provision did not have an
10 exception.

11 THE COURT: Okay.

12 MS. LIBEU: And they raised the point that
13 they're not required to disclose on unknown consultants and
14 they're allowed to keep them confidential.

15 We thought that was a good point which is why we
16 put in that exception. So I don't want it to seem like -- it
17 wasn't a litigation tactic for that reason, that was a
18 concession we made.

19 THE COURT: I agree. And I appreciate that.
20 Thank you for clarifying that. But I guess that's kind of the
21 issue, it's like that --

22 MS. LIBEU: Understood, understood.

23 THE COURT: Those things don't really make sense
24 at the end of the day, and if that's the compromise, it
25 doesn't seem to really make a lot of sense to me.

1 And, again, you know, you already have the
2 protections of the protective order itself that these
3 individuals are going to have to comply with.

4 And, certainly, I mean, you're all
5 representatives of the court as well, you know, so you're
6 going to be the ones that are providing these protective
7 orders, explaining it to them, making them sign that.

8 I don't think anybody in the room wants to come
9 before a judge and have to explain why somebody that they
10 brought into a case has violated the terms of the protective
11 order. So I just think that that becomes a problem overall,
12 and I don't think it's necessary, to be totally frank with
13 you.

14 That moves me to the filing of protected
15 information under what's paragraph -- or section 12 in this
16 particular version.

17 My concern is that that doesn't -- it
18 obviously -- you've tried to massage the requirements under
19 the local rule, but the problem is, is that when you file
20 something under the local rule, the clerk's office have
21 expectations about how that's going to look, and so changing
22 those requirements could be problematic internally for the
23 court.

24 And so I think it needs to comply with the local
25 rule in the way that it's drafted, but there's -- there's got

1 to be some way to do that, and I totally understand what the
2 parties are trying to do.

3 If you're submitting something to the court, and
4 you don't necessarily consider it confidential under the
5 protective order, you don't want to have to file a motion that
6 says this should be kept under seal, and I get that. But the
7 problem is that that's the expectation that the court will
8 have is that a motion is filed along with anything that's
9 filed under seal.

10 Now, that motion can read, you know, we are
11 preparing this and filing this under seal, we request that it
12 remain under seal for a period of time to allow the other
13 party to do something, but there needs to be some sort of
14 motion filing made at the time that the protected material is
15 filed under seal so that way it alerts the Court and the
16 clerk's office that we're complying with the rules and that
17 they will allow that to move forward.

18 And then we can deal with it with a motion to
19 seal if one is made, but I think that that needs to be somehow
20 reflective of the way that the local rule and the mechanism in
21 the local rule operates. So we'll need to have that modified
22 to some extent.

23 So I'll allow the parties to sort of work
24 through how to do that, but that -- that's something that I
25 don't think we can do without causing problems internally for

1 the court.

2 MR. FISCHBACH: And, Judge, if I could be heard
3 on that just briefly. You're right, we took the local rule
4 and tried to -- tried to massage it as you said.

5 I just want to be -- just so I'm clear, there
6 may be instances where, for example, Mr. Tripp is filing
7 something that includes material that Tesla has designated as
8 confidential, and under the local rule we would be required to
9 file a contemporaneous motion to seal.

10 Would it even be appropriate for us to take the
11 position in that motion that we're filing the motion to seal
12 because it's been designated as confidential, but we really
13 don't think this ought to be sealed away from public view?

14 That was the issue we kept running into is that
15 we might be filing a motion to seal even though we really
16 thought it shouldn't be sealed.

17 THE COURT: Well, I think that the basis for the
18 motion to seal is that this is protected under the protective
19 order. We don't want to violate the protective order by
20 disclosing information.

21 However, you know, we have -- I don't know how
22 you want to phrase it, but I think from that perspective the
23 requirement of the party to file that motion to seal is
24 twofold.

25 First, the rule requires if you're filing

1 something under seal, to file something along with it
2 contemporaneous alerting the Court as to why it's been filed
3 under seal.

4 Now, at that point the Court could say we deny
5 the motion to seal because you haven't provided us the basis
6 for sealing. However, if the opposing party comes in and
7 says, no, we are asking for it to be sealed and here are the
8 reasons for that, then we can look at it that way.

9 But that's how I would phrase it, is that the
10 motion to seal is really to ensure that you're complying with
11 the terms of the protective order you've entered into, but
12 whether or not the First Amendment and right of access issues
13 can be addressed through that, probably not. So it would then
14 be the opposing counsel to file something to really assure
15 that those things are actually addressed, if that makes sense.

16 MS. LIBEU: It makes sense I believe, your
17 Honor.

18 THE COURT: Okay.

19 MR. FISCHBACH: It does, Judge. We know how
20 Courts don't like things to be filed under seal so we were
21 just trying to avoid that whenever possible.

22 THE COURT: No, and I appreciate -- I appreciate
23 the situation that the rule creates, especially when you have
24 issues like this.

25 And I also understand that this may create a

1 little bit more complexity in attorney's fees and time and
2 things like that that may not be entirely, you know, from your
3 perspective, necessary. However, that's the rule, and that's
4 the way we need to comply with it to make sure that we don't
5 have any confusion.

6 My concern would be that if a motion wasn't
7 filed under seal, that the clerk's office would not file it
8 under seal or would unseal it unilaterally, and then we would
9 have a problem if it was, in fact, something that should have
10 been designated properly under seal.

11 So I don't want to have any issues on our side
12 creating that situation, so that's where my concern comes
13 from.

14 That takes us to section 17, paragraph (b). The
15 last line, I think it's lines 10 and 11, where you indicate
16 that the Court shall retain jurisdiction? No, the Court will
17 not retain jurisdiction.

18 So at the end of litigation, once this case is
19 over, if there's violations of the protective order that you
20 want to challenge, that will have to be done through a
21 separate suit. We do not maintain jurisdiction through
22 protective orders, jurisdictionally we just don't do that. So
23 that line will have to be taken out.

24 As well as in paragraph (f) there are sections
25 that talk about the responsibility to enforce the order, those

1 last two sentences that start at line 3 and go through line 6,
2 those need to be modified to say something to the extent of
3 during the pendency of this litigation, or as long as this
4 case is pending before the court, or something like that, to
5 ensure that there is no confusion over the long-term
6 jurisdictional requirements or obligations of the District
7 Court of Nevada as it relates to this protective order.

8 So does anybody have any questions over any of
9 that, or concerns that you want to raise on the record?

10 MS. LIBEU: No, your Honor.

11 MR. FISCHBACH: No, Judge.

12 THE COURT: Okay. So that takes me to the
13 last -- so are we clear on all the different modifications and
14 changes that I've asked for and that I've agreed to just
15 before we move on to anything else?

16 MS. LIBEU: Yes, your Honor.

17 MR. FISCHBACH: Very clear here, Judge.

18 THE COURT: Okay. Perfect.

19 Okay. That takes me to the last thing that I
20 wanted -- well, second to last thing, I should say, and that
21 is settlement conference.

22 I know the parties are obviously at the very
23 beginning stages of litigation and certainly discovery and
24 things of that nature, but I'm sure that everybody can
25 appreciate the costs that could be associated not just with

1 this case but just the general costs of publicity issues like
2 that.

3 So if the parties are interested, I'm more than
4 happy to set a settlement conference earlier rather than
5 later. It's up to the parties. I'm not generally someone
6 that would impose that on you, but I do want to put it out
7 there, that the Court is willing to do an early settlement
8 conference if that's something that the parties are interested
9 in.

10 But I will leave it to you to file something to
11 let us know or, you know, after this hearing, if you have a
12 chance to discuss it, whether by filing would probably be the
13 way to do it, that there be a request made through some sort
14 of stipulation of the parties to go ahead and set this for a
15 settlement conference.

16 This case seems to me to be one that probably
17 could settle early rather than later, and I do think that as
18 it goes on, it will be harder to settle. But, you know, like
19 I said, I wanted to leave that to the parties.

20 Any thoughts on that from the plaintiff's
21 counsel?

22 MS. LIBEU: My general practice is I'm always
23 open to talking settlement if that's interested on the other
24 side. So I would suggest that maybe counsel get together and
25 chat and see if there's a willingness to do that now rather

1 than later.

2 THE COURT: Okay. Anything --

3 MR. FISCHBACH: I agree, Judge.

4 THE COURT: Okay. Perfect.

5 You know, my inclination when I walked out here
6 was I thought I should set this for monthly case management
7 conferences to make sure that we're all on track and everybody
8 was getting along, but I have to be honest with you, as I've
9 already indicated probably three times, I'm very pleased with
10 how things are going and how well you guys are working
11 together and certainly moving forward in discovery.

12 My thought is, though, that because of the size
13 of the case and the complexity that this may end up being, is
14 to have more than one case conference. So I'm thinking that
15 we should set one out for 60 days from today.

16 We can do that telephonically on the next one,
17 just to make sure if there's any issues, any discovery
18 hiccups, anything that needs to be addressed, we can do that
19 at the case conference rather than requiring people to file
20 motions on discovery-related issues.

21 And then I think at that point, depending on
22 where you're at with settlement, or even where you're at with
23 the discovery situation or amendments to the complaint or to
24 the claims, we can address whether or not, you know, the time
25 frames that we have set out in the scheduling order still make

1 sense or whether those need to be modified, and that way,
2 again, we're saving everybody time and effort from filing
3 things and going through that process.

4 Is there any objection to that from the
5 plaintiff's counsel?

6 MS. LIBEU: No objection, your Honor.

7 THE COURT: And defense?

8 MR. FISCHBACH: No objection, Judge.

9 Just so I'm clear, you're suggesting that to the
10 extent discovery disputes do arise, that we should kind of
11 save them to address the Court at the next status conference
12 as opposed to papering the Court with motions?

13 THE COURT: I would prefer that, but I will say
14 this. I understand how discovery works, and I understand that
15 there are some times that you need an immediate decision, you
16 can't wait.

17 So to the extent that that happens, you're
18 obviously not prohibited from doing that, but I would say
19 that, you know, the types of discovery issues that you may be
20 arguing over but they aren't immediate, that we save those for
21 the case management conference.

22 One thing we could do, too, if you do have to
23 file something immediate, we could move up a conference and
24 just have it then as opposed to waiting.

25 But I think for right now we'll just set it for

1 60 days, and, like we said, if there's an emergency situation,
2 don't feel that you can't file something. But to the extent
3 that you can save it for the conference, let's just save it
4 for the conference to save everybody time and money, and
5 that's how we'll proceed.

6 At this point is there anything further from the
7 plaintiff that you'd like to put on the record or that you
8 need to make the Court aware of?

9 MS. LIBEU: No, your Honor, nothing further from
10 us.

11 THE COURT: Okay. Thank you very much.

12 And from the defense?

13 MR. FISCHBACH: Nothing else, Judge. Thank you
14 for your time this morning.

15 THE COURT: Absolutely. Well, thank you
16 everybody, I'll -- in terms of an updated protective order,
17 would seven days be enough time for you to submit a new
18 stipulated protective order to the Court?

19 MS. LIBEU: I think so, your Honor. We've been
20 working well together on getting things like that
21 accomplished, and I anticipate that will continue so that
22 should be no issue. But we'll let you know if, for some
23 reason, seven days becomes a sticking point.

24 THE COURT: Okay. So for purposes of the order,
25 we'll order the parties to file an amended or stipulated

1 protective order, however we want to put that. I guess it's
2 not amended because nothing has been entered yet, but a
3 stipulated protective order with the Court for my signature.
4 What is the date on that?

5 THE CLERK: Thursday, October 11th, your Honor.

6 THE COURT: And with respect to the case
7 conference report, we'll go ahead and get a date and time for
8 that and make sure that that's acceptable to the parties.

9 THE CLERK: Monday, December 3rd at 9:00 a.m.

10 THE COURT: If you need to check your calendars,
11 please feel to do that, we can wait a minute.

12 MS. LIBEU: That's fine for the plaintiff, your
13 Honor.

14 MR. FISCHBACH: Works for the defense as well,
15 Judge.

16 THE COURT: Perfect. Well, thank you all again,
17 and with that we will be --

18 MR. FISCHBACH: One question, Judge, sorry.

19 THE COURT: Sure.

20 MR. FISCHBACH: To the extent there are any
21 sticking points on a protective order, if there's one or two
22 little nits we just can't iron out, what is your preference
23 for how we submit those to the Court?

24 THE COURT: What does the calendar look like?
25 Hold on one second.

1 (Discussion held off the record.)

2 THE COURT: How about we do this. How about if
3 there's any issues with the protective order, that the parties
4 contact the Court on Tuesday, December -- or October 9th, and
5 if we need to, we can set a telephonic conference either on
6 the 10th or the 11th in the morning to deal with that rather
7 than having people file, and we can just work those out over
8 the phone.

9 And I would just ask before if we do do that,
10 I'll just ask somebody to send me a copy of a redline version
11 again so that way we can just work through those issues just
12 the way we've done today.

13 Is that acceptable?

14 MS. LIBEU: Yes, your Honor.

15 MR. FISCHBACH: Certainly, your Honor, thank
16 you.

17 THE COURT: Okay. Perfect. Okay. With that,
18 we'll be in recess. Thank you so much.

19 MS. LIBEU: Thank you, your Honor.

20 -o0o-

21 I certify that the foregoing is a correct
22 transcript from the digital recording of proceedings
in the above-entitled matter.

23 /s/Margaret E. Griener 10/26/2018
24 Margaret E. Griener, CCR #3, FCRR
25 Official Reporter

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